Supreme Court, U.S.
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No. 98-1894

In The

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District, Division Two

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court deny a landowner the right to compensation, in violation of the Fifth Amendment and contrary to this Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), for the period of time during which a legal challenge is made to a governmental assertion of authority which is ultimately determined to be an invalid action because it is beyond the jurisdiction of the government agency?

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereafter C.A.R.) submits this brief in support of the Petition for Writ of Certiorari.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

C.A.R. is a voluntary trade association representing the interests of approximately 95,000 persons licensed as real estate brokers and salespersons by the State of California. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. C.A.R. pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, advocating positions to legislative bodies, providing legal advice to members and participation as *amicus curiae* in relevant court cases.

C.A.R. members believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

unduly diminished or jeopardized by governmental action without just compensation.

Unfortunately, due to the oftentimes hostile position that California agencies and courts have taken with regard to property rights, C.A.R. is not a novice as an *amicus* in governmental takings litigation, particularly involving the Coastal Commission, as evidenced by the continual parade of California takings issues before the United States Supreme Court. C.A.R. has participated as an *amicus* before numerous courts including this one in the seminal cases of *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and most recently in *City of Monterey v. Del Monte Dunes*, 95 F.3d 1422 (1999). The current state of affairs in California again makes it necessary for C.A.R. to take a role as *amicus*.

THE PETITION FOR WRIT OF CERTIORI SHOULD BE GRANTED AS THE FEDERAL CONSTITUTIONAL RIGHT REGARDING THE TEMPORARY TAKING OF PROPERTY WITHOUT JUST COMPENSATION CANNOT BE ABROGATED BY CALIFORNIA AGENCIES AND CALIFORNIA COURTS.

If the *Buckley* case is allowed to stand, property owners will be forced to choose between two losing propositions. The owner could cede to the unreasonable and illegal demands of an overzealous agency or the owner could challenge the government regulation knowing that, unlike property owners in other states, success of such challenge comes at a high price. The price in California is the inability to receive damages for the unlawful taking

during the course of the legal challenge. Why? Because the California Supreme Court has ruled that the period of time during which a governmental regulation is judicially challenged is nothing more than a normal, expected, administrative delay in the process and not a taking worthy of just compensation. *Landgate, Inc. v. California Coastal Commission* (1998), 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841. Simply put, a legal challenge would preclude a court from awarding damages during the temporary taking. This is true even if during the challenge period the property owner is deprived of all economically viable use of its property. A philosophy that there is no deprivation, even temporarily, of a series of outrageous and arrogant acts by a California governmental agency until it is fully litigated, presumably even to this Court, makes it impossible for California property owners to ever be made whole. The United States Constitution protects California property owners from such results, even though the California Courts have refused to recognize these protections, which now requires, once again, this Court to step in to enforce these core rights.

The local city, county, Coastal Commission and any other government authority can make decisions to delay, obstruct or ultimately wear down property owners who neither have the means nor the economic staying power to challenge the current holders of the land use regulatory kingdom. If the decision crosses the line into the confiscatory, then the local government's only penalty is to undo the decision, not any damages for the undue delay or inability to use the land. It is a free leasehold for open space, or freeze on use for the interim, actually giving incentives for delay when there is a weak position

taken by the government. For those seeking to deter development of any kind, this is still a win as it gives increased leverage to those ruling the land use empire to extract more during the fight. Those wishing to use their purchased bundle of not only dirt but the rights we call property are left with no remedy for the delay and deprivation of use, only extensive legal fees for the privilege of enforcing such rights. The frequency of this abuse is altogether too obvious by the history of cases that continue to populate California jurisprudence.

C.A.R. is not so naïve as to think that enforcing constitutional rights is inexpensive or expeditious but at some point, the leverage is so shifted as to exacerbate the right, especially when there is little if any downside to the offending party. Such dynamics are more often in the business litigation world in which business risks are calculated in a civil justice arena with a relatively even playing field, without constitutional dimension. When one party has unilateral power to control the rules, only the United States Constitution can serve as a buffer to protect against those abuses of government that tread on rights central to the United States' private property system and freedom. This case presents such a situation.

California Appellate and California Supreme Court decisions are inconsistent with the rules articulated in this Court and undermine U.S. Supreme Court authority. Not only are California property owners forced into a no-win situation, California jurists are also forced into the judicially awkward position of answering to two masters. California trial and appellate courts have been forced to choose between sound U.S. Supreme Court authority and

seemingly irreconcilable California Supreme Court authority.

CONCLUSION

C.A.R. believes that this Court needs to step in and reassert its authority, and that of the United States Constitution, in the arena of temporary regulatory taking and remedies for these unanswered abuses. Failing to do so results in less protection under the Constitution to those owning real property in the State of California, and to those California jurists validly attempting to do justice in their courtrooms. Accordingly, C.A.R. urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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